TAN CHONG & SONS MOTOR CO. SDN. BHD.

v.

ARUMUGAM PACKIRISAMY & ANOR.

HIGH COURT MALAYA, ALOR SETAR
KC VOHRAH J
[CIVIL APPEAL NO. 11-11-1989]
30 APRIL 1992

CIVIL PROCEDURE: *Third party proceedings - Whether a valid proceeding under O. 12 r. 1(b) Subordinate Court Rules 1980 - Third party claim in contract - Defendant's liability to plaintiff in tort - Whether subject matter similar - Whether relief or remedy substantially the same*

LIMITATION: *Third party - Whether limitation runs from the date the defendant is found liable to the plaintiff - Whether time runs from the date of breach of contract by third party - Section 6(1)(a) Limitation Act 1953..*

Arumugam (A) the 1st respondent had obtained judgment against the 2nd respondent (LK) for damages in respect of injuries sustained in an accident. LK had brought in Tan Chong Motor Co. Sdn. Bhd. (TC), the appellant, as a third party under O. 12 r. 1(b) of the Subordinate Court Rules 1980. TC was subsequently found liable to indemnify and for contribution towards LK.

As the award against LK towards A was below RM10,000 TC appealed against the judgment on a question of law under s. 28(1) Court of Judicature Act 1964 and cited A and LK as respondents.

The point of law the Court decided upon was whether LK's third party claim against TC was valid under O. 12 r. 1(b) Subordinate Court Rules 1980 as it was a claim for indemnity or contribution based upon a breach of contract to purchase and have in force an insurance cover in respect of the car driven by LK that was involved in the accident with A whereas the claim against LK by A was in respect of damages for injuries sustained in the accident. LK did not allege that TC agreed to indemnify or contribute towards the damages awarded against LC in the event of an accident involving the car.

Another point of law the Court dealt with arose in the course of argument was the issue of limitation in regard to the third party claim as the third party proceedings was commenced some 9 years after the breach of the oral contract in excess of the 6 years limitation imposed under s. 6(1) of the Limitation Act 1953. It was argued that limitation starts to run against a third party only when the defendant had been found liable to the plaintiff.

Held:

[1] Breach of an oral contract to purchase and have in force an insurance cover for the car without more does not give LK the right to be indemnified or receive contribution from TC.

[2] As the claim between A and LC was in tort for damages in respect of personal injuries and the third party claim by LK against TC was for breach of an oral contract, the subject matter of the third party claim was dissimilar and the relief or remedy claimed are not substantially the same as to qualify the third party claim under O. 12 r. 1(b). The Magistrate had erred in holding the claim to be one under O. 12 r. 1(b).

[3] Even assuming that the third party claim was valid, as the claim by LK against TC is not one for indemnity or contribution from TC but a claim in contract, time does not start to run when LK had been found liable to A and therefore since more than 6 years had lapsed since the date of the breach the action against TC is therefore time barred.

[Appeal of third party allowed with costs]

Case referred to:
Hordern Richmond Ltd. v. Duncan [1947] 1 All ER 427 ***(dist)***

Legislation referred to:
Courts of Judicature Act 1964, s. 28(1)
Limitation Act 1953, s. 6(1)(a)
Rules of the High Court 1980, O. 16 r. 1
Subordinate Courts Rules 1980, O. 12 r. 1(a), (c)

Other sources referred to:
Supreme Court Practice, 1988 Edn., p. 235
Practical Approach to Assessment of Liability and Damages in Tort, R.K. Nathan, p. 208

For the appellant - S. Visvanathan; M/s. Syarikat Visva
For the respondents - Teja Singh; M/s. Yahaya & Teja

JUDGMENT

KC Vohrah J:

In the Sungei Petani Magistrate's Court the plaintiff, Arumugam s/o Packirisamy sued one Ling Kean Ming (the 1st defendant) and one Mohd. Kassim (the 2nd defendant) for damages in respect of injuries sustained in an accident. Arumugam alleged that Ling negligently knocked him down with the car he was driving. Ling brought in Tan Chong & Sons Motor Co. Sdn. Bhd., as third party, claiming indemnity or contribution against the company in the event he was found liable.

The Magistrate allowed the claim of Arumugam against the 1st defendant and awarded him a total of RM8,890 as general and special damages. She dismissed the claim against the second defendant. According to the judgment dated 30 December 1989, extracted the same day, the Magistrate ordered that Tan Chong & Sons Motor Co., the third party, "indemnify the 1st defendant for all damages and costs that he shall hereby be liable to pay to the plaintiff."

The third party appealed against the judgment of the learned Magistrate and the appeal cited Arumugam (plaintiff) and Ling (1st defendant) as respondents.

The appeal against Arumugam in regard to the liability and quantum awarded has been withdrawn and what remains is the appeal against Ling. There being no appeal on quantum, the value of the subject matter remains at RM8,890. And under s. 28(1) of the Courts of Judicature Act 1964 "... no appeal shall lie to the High Court from a decision of a Subordinate Court in any civil cause or matter where the amount in dispute or the value of the subject matter is ten thousand ringgit or less on a question of law."

Counsel for the appellant stated that he was raising an issue of law. He formulated the issue as:

> The question is whether a party who is alleged to have broken a term of a contract can be made liable for the tort of the other contracting party occasioned to a stranger to the contract, that is, the plaintiff.

In the context of this case the issue was nebulously framed and I shall return to it shortly.

The 1st defendants' Counsel agreed to deal with the issue as a point of law. Later in the course of argument it transpired that Counsel for the appellant had another point of law to deal with and that was the issue of limitation in regard to the third party claim.

The short point in regard to the first issue is this - that the third party proceedings taken by the 1st defendant in the case against the third party is based on breach of an alleged oral contract by third party to purchase and have in force an insurance cover in respect of the car that the 1st defendant drove and met with an accident. That was pleaded in Ling's claim against the third party. There is no allegation that the third party agreed to indemnify or contribute towards the damages awarded against the 1st defendant in the event of an accident involving the car. But the prayer in the claim is for indemnity or contribution. I, however, do not see how the breach of the oral contract to purchase and have in force an insurance cover for the car can give the 1st defendant a right to be indemnified by the third party or receive contribution from the party.

As is pointed in the *The Supreme Court Practice* (1988 Edn.), p. 235:

> A right to damages is the converse of a right to indemnify the former being an incident which the law attaches to breach of contract, the latter being a provision, express or implied, of the contract itself. So where there was no express or implied contract to indemnify, a claim for damages was held not to be within the old rules before 1929 (*Birmingham, etc Land Co. v. L & W.W. Ry* [1886] 34 Ch.D 261; *Speller v. Bristol Co.* [1884] 13 QBD 96). But such cases fall within the present rule, at all events where the damages recoverable by the plaintiff against the defendant and by defendants against the third party are substantially similar, though the case is not one of indemnity, either express or implied; but the subject matter must be the same.

The reference to "the present rule" is a reference to the English O. 16 r. 1; in the High Court here the equivalent provision is O. 16 r. 1 of the Rules of the High Court 1980 and the equivalent for the Subordinate Courts Rule is O. 12 r. 1 of the Subordinate Court Rules 1980.

The third party claim by the third defendant cannot fall under subrule (a) of r. 1 of O. 12 of the Subordinate Court Rules. If at all it can only be brought under subrule (c) of r. 1 but I have lingering doubts about that too but since there is no appeal against the order of the Magistrate allowing the application for leave for the third party notice to issue I shall say no more about it.

In the notes of proceedings in the appeal record it will be seen that the learned Magistrate ordered this in respect of the third party proceedings.

> Untuk kes defendan dan pihak ketiga juga berdasarkan keterangan yang difailkan dan diberi di Mahkamah berdasarkan O. 12 r. 1(b) Mahkamah putuskan (pihak ketiga) gagal melaksanakan tugas mereka kepada defendan pertama. Oleh itu Mahkamah perintahkan pihak ketiga itu bertanggongjawab memberi remedi atau relief kepada defendan

With respect I do not see how the Magistrate can come to the conclusion the third party claim of the 1st defendant is based on O. 12 r. 1(b) which reads:

> 12(1) Where in any action a defendant who has filed a defence:
>
> (a) claims against such person any relief or remedy relating to or connected with the original subject matter of the action and substantially the same as some relief or remedy claimed by the plaintiff, or
>
> (c) ...
>
> then, the defendant may, with the leave of Court, issue a third party notice ...

The original subject matter of the action is a claim in tort in regard to a motor accident where the plaintiff sued, *inter alia*, the 1st defendant for damages in respect of personal injuries sustained in the accident; the claim of the 1st defendant against the third party is in contract, a dissimilar subject matter, for breach of an oral agreement to purchase a third party insurance policy for the car that was involved in the accident and certainly the relief or remedy cannot be the same or substantially the same as claimed by the plaintiff. The Magistrate was thus wrong in saying the claim of the third party is one under O. 12 r. 1(b).

I come now to the issue of limitation which Counsel for the third party brought up in the Magistrate's Court. Assuming the third party proceedings were valid the issue is the one raised in para. 5 of the statement of defence of the third party which Counsel argued as this: that since the third party's claim was in contract it was time barred; it was commenced some 9 years after the breach of the oral promise, in excess of the 6 years limitation imposed under s. 6(1)(a) of the Limitation Act 1953. The learned Magistrate did not make a ruling on the matter and probably she relied on the statement of Counsel for the 1st defendant that the defence of limitation does not apply as time starts to run from the day the 1st defendant became aware of the breach of the third party. In the appeal before me Counsel quoted from R.K. Nathan "*Practical Approach to Assessment of Liability and Damages in Tort*" at p. 208:

> Proceedings by a defendant against a third party are independent of and separate from the proceedings by the plaintiff, and the Limitation Act 1939, only starts to run in favour of a third party when the defendant has been found liable to the plaintiff.

The case quoted for this principle is *Hordern Richmond Ltd. v. Duncan* [1947] 1 All ER 427. I have gone through the case and I regret to say that that case is authority where the defendant claims indemnity or contribution against a third party; here the claim of the 1st defendant against the third party is not indemnity or contribution from the third party but in contract and therefore the claim is time barred.

The appeal of the third party is allowed with costs.

Also found at [1992] 3 CLJ 1477